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Supreme Court, U.S.
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No. 88-1447

IN THE

Supreme Court of the United States

OCTOBER TERM 1988

WARD PETROLEUM CORPORATION, NOVA ENERGY CORPORATION, VERLAN W. HARRELL, L. O. WARD, RICHARD D. VEAL, RAYMOND DALE SHIPLEY, SMACK DAB, LTD., NORMAN R. GELPHMAN, THOMAS G. WYGANT, DAVID M. PULLING, JAMES E. KUHLMAN, T. MICHAEL COCHERES, GILBERT TOMPSON, WHITBAR ENERGY LIMITED PARTNERSHIP, LARRY E. BOYD, and JAMES HASENBECK,
Petitioners,

v.

THE LOUISIANA LAND and EXPLORATION COMPANY as successor by merger and acquisition to INEXCO OIL COMPANY, THE OKLAHOMA CORPORATION COMMISSION (composed of JAMES B. TOWNSEND, BOB HOPKINS, and BOB ANTHONY), ROBERT H. HENRY as Attorney General for the State of Oklahoma, ROD W. YLITALO, MCFARLANE COMPANY, and TRIMBLE PROPERTIES,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE OKLAHOMA SUPREME COURT

PETITIONERS' REPLY BRIEF

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QUESTIONS PRESENTED

I. Did the Oklahoma Supreme Court unlawfully take Petitioners' property, or deprive them of their property, contrary to the Fifth and Fourteenth Amendments of the United States Constitution, when that court rendered Petitioners' mineral leaseholds totally worthless by rewriting an earlier-issued final order, even though the order when issued recognized and validated Petitioners' leasehold interests and even though Petitioners relied on the clear intent and plain language of that order in making a multi-million-dollar investment decision?

II. Were Petitioners deprived of their right to procedural due process when the Oklahoma Supreme Court declared post-hoc that Petitioners' election not to participate under a "forced pooling order" extinguished Petitioners' mineral leasehold interests, even though the State had notified Petitioners before their election that the opt-out election would *not* extinguish Petitioners' leasehold rights?

RULE 28.1 STATEMENT

As required by Rule 28.1 of this Court, corporate Petitioners have listed their parent companies, subsidiaries, and affiliates at page *ii* of their Petition for a Writ of Certiorari to the Oklahoma Supreme Court.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE OKLAHOMA SUPREME COURT

PETITIONERS' REPLY BRIEF

Petitioners submit this Reply Brief under S. Ct. R. 21.5 to address arguments first raised in the Respondent's opposing brief. This Reply Brief is necessary to correct the factual and legal errors of the Respondent, The Louisiana Land and Exploration Company as successor to Inexco Oil Company (the Respondent is sometimes referenced as "Inexco").

I. Respondent's state-law-only assertions miss the whole point of Petitioners' constitutional claims in this case.

For all its detail, Inexco's opposing brief makes two assertions. Inexco first asserts that Petitioners seek review of the state-law question whether forced pooling under Oklahoma's pooling statute should be done only once (on a unit basis) or once for each well drilled (on a well-bore basis). *Petitioners do not raise this question,* which was answered in 1988 by the Oklahoma Supreme Court's *Amoco Production Co. v. Corporation Commission,* 751 P.2d 203 (Okla. 1988). Before this Court, Petitioners make a wholly different plea as the basis for why grave constitutional wrongs have been committed.

Pooling in Oklahoma has been done in two very different ways:

> Pre-*Amoco*. Before *Amoco,* the Oklahoma Corporation Commission interpreted the pooling statute to allow well-bore pooling. That is, an interested owner could elect out of the first well, and still maintain the right to participate in the second and later wells.
>
> Post-*Amoco*. After *Amoco,* the Oklahoma Corporation Commission could pool only on a unit basis. To participate in a second and later wells, an interested owner must thus elect to participate in the first well.

The First Order in this case was issued before *Amoco,* when the Commission pooled *exclusively* by the well bore. Unquestionably, the First Order had a well-bore scope.[1] Even so, Respondent Inexco focuses upon the post-*Amoco* interpretation of the pooling statute to suggest

[1] *See* certiorari petition at 14-18.

that because of such interpretation, the First Order must have been a unit order, and that only a question of state law exists. But the Oklahoma Supreme Court's interpretation of the statute, no matter how reasonable, could not change the meaning of the already final First Order. It is the wholesale after-the-fact rewriting of the First Order—not the interpretation of an Oklahoma statute—that forms the basis of Petitioners' constitutional claims here.

Left unsuccessful with the first assertion that this case involves only a matter of interpreting Oklahoma statutes, Respondent Inexco next asserts that the Oklahoma Supreme Court somehow conducted a state-law inquiry by searching for the intended pooling scope of the First Order and finding it to have "always" been unit-wide.[2] But to repeat: the Oklahoma Corporation Commission authored the First Order before *Amoco,* when the Commission's avowed policy was to pool exclusively by the well-bore. So the First Order was intended, meant, and understood as having only well-bore scope. Nowhere has the Oklahoma Supreme Court or Respondent Inexco ever squarely addressed the intent, meaning, or understanding of the First Order. Instead, both the Oklahoma Supreme Court and Inexco's opposing brief say only that the scope of the First Order had to be unit-wide because it could not as a matter of law be anything else. The rub is that the unit-only rule did not come until 1988, years after Petitioners had surrendered what they were misleadingly told would be their property interests in only a single well (what became the piddling Wolfe Well). Not until after this misleading pre-1988 notice did Petitioners learn that they had been summarily ousted of their property interests in all later wells (like the prolific Albright Well).

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[2] *See* Respondent's opposing brief at 15-16.

This sting suffered by Petitioners goes largely unaddressed by both the Oklahoma Supreme Court and Inexco. Given the undeniable well-bore scope of the First Order as written and reaffirmed by the authoring Commission, the constitutional problem presented here becomes apparent. A simple hypothetical, on all fours with this case, drives Petitioners' point home:

Assume that a landowner owns two buildings on adjacent land parcels also owned by landowner. Call the parcels "left" and "right," and assume each is worth $1 million. Next, assume that the city needs property in this neighborhood, so it brings a condemnation action. The city relies on a state condemnation statute which happens to prohibit condemnation of partial tracts. Even so, the trial judge after a hearing enters an order condemning the "left" parcel, transferring it to the city, and compelling the city to pay the landowner $1 million. The landowner is satisfied with the price, so he does not appeal. Neither does the city. A year later, the city calls the sheriff, forcibly removes the landowner from the "right" parcel, and takes possession of it.

The landowner brings an injunctive action before exactly the same judge who heard the original condemnation action. The trial judge writes an opinion that says, "When I issued the condemnation order, I said that the left parcel was condemned, but not the right parcel. Therefore, I hold that the city cannot now take the right parcel."

The city appeals. While the appeal is pending, the state supreme court in an entirely separate case construes the state condemnation statute to say that a trial judge can never enter a condemnation order that splits adjacent tracts. Thereafter, the injunction case on landowner's left and right parcels comes before the state supreme court. This court then issues a decision saying that when the trial

judge entered the first condemnation order, he clearly ordered condemnation of both the left and the right parcels.

As a matter of constitutional law, this is exactly what has occurred here. Unquestionably, it raises fundamental constitutional questions of fair notice and just compensation. To say as Inexco does that such a case raises only state-law questions because the state supreme court merely interpreted an earlier state court order is preposterous. Just as in the above hypothetical, the rewriting of the First Order here in the teeth of its undeniable meaning when issued obviously presents a grave constitutional problem which this Court should correct via certiorari review.[3]

II. Petitioners have established an unconstitutional taking of their property interests after they received a misleading notice when they cast their opt-out elections.

What Inexco's opposing brief completely fails to address is the crux of the constitutional violation that occurred in this case. Under the pre-*Amoco* rule, the First

[3] The constitutional violation in this case is even more egregious than the violations condemned by this Court in *Bouie v. Columbia*, 378 U.S. 347 (1964). Cast in *Bouie* terms, this case is equivalent to allowing a defendant to plead guilty of a lesser included offense, sentencing him to a prison term, and then, over four years later, when the state supreme court decides that the statute allowed conviction only for the greater offense, simply extending the defendant's sentence a few years and assuming conviction for the greater offense. Or, on even closer facts, this case is equivalent to the state's condemning a 25 foot width of property for a road, and then, when the state supreme court decides that the applicable statute requires condemnation of a minimum of 35 feet, automatically expanding the width from 25 feet to 35 feet, without new notice, without new hearing, and without additional compensation. *See Barfnecht v. Town Board of Hollywood Township*, 232 N.W.2d 420, 423 (Minn. 1975).

Order was entered as a well-bore order and became final without appeal. Petitioners elected out under the First Order after being told by the State that they would have an option to participate in the second well. When it came time to participate in the second well, the State "changed its mind," decided that the First Order should not have given Petitioners that option, and completely foreclosed Petitioners from any further participation in the unit. Petitioners were paid only for selling their interests in the first well, and not any subsequent wells; Petitioners were given notice that their election would concern only the first well, and not any additional wells; and Petitioners received a vested property right in the final judgment of the First Order that was subsequently disturbed by a collateral attack.

These are not issues of state law. These issues do not concern what is the proper interpretation of the Oklahoma pooling statute. Nor can the 1988 decision in *Amoco* permit a rewriting of the already final and never-appealed First Order which was intended, meant, and understood to have a limited scope not barred until 1988. Instead, the facts of this case raise serious constitutional questions whether Petitioners' property interests in additional wells within the unit were taken without just compensation, whether Petitioners were deprived through a "condemnation-type" proceeding of their full interests in the unit without due process because they received misleading notice, and whether Petitioners' vested property rights in a final judgment were improperly destroyed by an unwarranted collateral attack on that final judgment.

Petitioners recognize that Oklahoma law now provides for unit pooling. But Respondent Inexco never really addresses whether an admittedly incorrect interpretation of state law may nevertheless create constitutionally pro-

tected interests in those who rely upon such incorrect interpretation. True, this Court does not decide questions of state law, but a state court cannot contravene constitutional limitations and evade this Court's review by casting its decision as a question of state law. *See, e.g., Fiske v. Kansas,* 274 U.S. 380, 385-86 (1927); *Enterprise Irrigation Dist. v. Canal Co., 243 U.S. 157, 164 (1917).*

III. Petitioners have presented no "inaccuracies" or "misleading statements."

What Inexco's opposing brief calls "inaccuracies" and "misleading statements"[4] are either omitted unnecessary details or stem from Inexco's stubborn refusal to recognize pre-*Amoco* law. The challenge to Petitioners' ethics[5] is a challenge to facts presented to the Oklahoma Supreme Court, which bear out Petitioners' geological theories presented to the Oklahoma Corporation Commission as far back as the proceedings resulting in the First Order in this case.[6]

Respondent challenges Petitioners' statement that a unit is developed one well at a time. This statement is absolutely true, both before *Amoco* and after *Amoco*. If the first drilled well cannot drain the unit, an additional well will be drilled. This fact becomes most important when the interested parties disagree about the optimal location of the well. Under the pre-*Amoco* well-bore regime, only the

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[4] *See* Respondent's opposing brief at 2, 6.

[5] *See id.* at 10.

[6] Respondent's challenge of Petitioners' ethics for including "unsubstantiated figures" has no merit. All of the figures stated by Petitioners are in the record. *See* R. 86-87 (figures for Wolfe well); verified statement filed July 26, 1988, apprising Oklahoma Supreme Court of post-appeal developments under Oklahoma Supreme Court Rule 7, p. 1-42 (figures for Wolfe and Albright Farms Well).

first well in the unit was pooled by the initial pooling order. It was contemplated that if additional wells were drilled, every interested party would again have an option to participate. Thus, if an interested party believed the first well was located in the wrong place, he was legally free to elect out of that well and to participate in the additional well drilled later to effectively drain the unit.

Only after Amoco was this legal result changed. After *Amoco,* since well-bore pooling is no longer an option, the owner must participate in the first *marginal* well in order to participate in a second *efficient* well that will drain the unit.

Before *Amoco,* developing one well at a time had key importance where the interested parties disagreed over the optimal location. If the non-participating owners were correct in supporting an alternative location, then they were free to participate in the additional well that would have to be drilled to drain the unit.

That is exactly what occurred in this case. Under the well-bore regime before *Amoco,* Petitioners disagreed with Respondent Inexco over the optimal location of the first well. Petitioners opted out of the first well and elected to participate in the additional well. The additional well was the optimal well. Because the operator chooses where to locate a well, there is no need to mention location in the pooling application. But in choosing the operator, the Commission relies upon the operator's geological statistics and proposals. Thus, when Petitioners supported the appointment of Petitioner Ward Petroleum Corporation as operator of the first well, they clearly voiced their support of the alternative (optimal) location of the well in the Section 23 unit.[7]

[7] Inexco had completed an offset well in Section 25, the southeast diagonal offset to Section 23, as a dry hole. Thus, Petitioner Ward

Respondent Inexco accuses Petitioners of misleading the Court by equating seeking an additional well with seeking a second forced pooling order. This attack is but another example of Respondent's failure to recognize the pre-*Amoco* pooling regime. Before *Amoco,* every additional well was subject to an additional forced pooling order. Only with the decision in *Amoco* did a party initially electing out lose the right to have his interests in additional wells pooled on a separate basis when the additional wells were drilled. Also, when a second well is drilled, it is necessary to provide an opt-out election to those originally electing to stay in the unit.

Well-bore pooling existed in Oklahoma before *Amoco.* The First Order in this case was decided under a well-bore policy. The facts of this case must be considered against that pre-existing law. The facts cannot be artificially presented by imposing a subsequent legal fiction of unit pooling on a pre-*Amoco* setting.

IV. Petitioners have established an unconstitutional attack on the vested property interests of a final judgment.

Citing *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673 (1930), Respondent argues this Court has no jurisdiction over mere questions of erroneous interpretations of state law. That is what *Brinkerhoff-Faris* says. But *Brinkerhoff-Faris* also says that permitting a retroactive application of a new interpretation of state law deprived petitioner of its property without an opportunity to be heard. *Id.* at 679. That is what has happened in this case.

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[7] (Cont'd) determined that the optimal drilling location was the North Half of Section 23. R. 56-57. Petitioners elected not to participate in Inexco's well because of concerns over its location. R. 51-52, 167-68.

Even if the Oklahoma Corporation Commission misinterpreted the Oklahoma pooling statute, that interpretation was "an existing juridical fact until overruled, and intermediate cases finally decided under it are not to be disturbed." *Linkletter v. Walker,* 381 U.S. 618, 624 (1965) (describing Austinian approach); *Chicot County Drainage District v. Baxter State Bank,* 308 U.S. 371, 374 (1939).

The Oklahoma Corporation Commission adopted a policy of well-bore pooling. The First Order was decided under that policy. *Amoco* later declared that the well-bore pooling policy was not valid. However, the existence of the final First Order is a juridical fact that cannot be ignored. Petitioners received vested property interests in that final judgment, relied on that judgment, and cannot be divested of those interests without now being accorded new elections to participate in the unit.

In sum, this Court should grant the relief requested by Petitioners on pages 27-28 of their certiorari petition.

Respectfully submitted,

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